



DETROIT AND MICHIGAN CHAPTER
NATIONAL LAWYERS GUILD
ESTABLISHED 1937



October 1, 2010

Mr. Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Administrative File No. 2010-16

Dear Mr. Davis and Justices of the Court:

We write on behalf of the Michigan/Detroit Chapter of the National Lawyers Guild to comment on Administrative File No. 2010-16, which proposes changes in MCR 6.302 and 6.610 in light of *Padilla v Kentucky*, ____ US ____; 130 S Ct 1473; 176 L Ed 2d 284 (2010). We are a local chapter of the National Lawyers Guild (NLG), a national organization formed in 1937. The NLG was the nation's first racially-integrated voluntary bar association, and was formed to advocate for the protection of rights granted by the United States Constitution and for the promotion of fundamental principles of human and civil rights. The NLG was one of the non-governmental organizations selected to officially represent the American people at the founding of the United Nations in 1945, and its members helped draft the Universal Declaration of Human Rights. The NLG has been in the forefront of criticism of Arizona SB 1070, as permitting state-sanctioned harassment of and discrimination against persons who physically appear to be of Hispanic origin.

Alternative A

The Michigan/Detroit NLG strongly opposes Alternative A, which would require the trial judge to inquire whether a defendant who is pleading guilty or nolo contendere is a noncitizen, and whether counsel has discussed with the defendant "the possible risk of deportation that may be caused by the conviction." We share the view of the Michigan Association of District Court Magistrates that: "To require the trial courts to affirmatively inquire into the content or extent of attorney-client communications [Alternative A] is heading down a slippery slope that should be avoided." (Letter of J. Kevin McKay, Vice-President and President-Elect, September 28, 2010).

The Michigan/Detroit NLG opposes any inquiry by the trial court into a defendant's immigration status. Such an inquiry could lead to one of two equally problematic results for defendants who are illegally in the country, since such persons will be wary of divulging their status on the public record. If they do respond, they will either misstate their status out of fear of the consequences of admitting to that status; or they will admit to being in the country illegally, which admission will expose them to the risk of adverse consequences. All of this is unnecessary, and far beyond the legitimate purview and purpose of the relevant court rules.

For the same reason, the Michigan/Detroit NLG opposes any invitation for the trial court to make factual findings concerning the defendant's immigration status.

The Michigan/Detroit NLG also opposes Alternative A because the description of the event which could trigger the adverse consequences is too narrow. The consequences ensue not only from conviction, but also from any admissions a defendant might make, regardless of whether an adjudication of guilt follows.

The Michigan/Detroit NLG opposes any inquiry by the trial court concerning or intruding upon the confidential communications that may have occurred between counsel and the defendant. It should not be the purpose of the court rules to police the conduct of defense attorneys or invade the province of their relationships with their clients.

Alternative B

The Michigan/Detroit NLG supports the adoption of Alternative B, with modifications. Alternative B would require the trial judge to give general advice to any defendant that a guilty or nolo contendere plea by a noncitizen may carry immigration consequences. This advice is rendered regardless of the defendant's actual immigration status. Thus, this alternative meets the goals of the proposed rule change, without inviting any of the problems presented by Alternative A.

The Michigan/Detroit NLG also favors Alternative B because the language describing the potential consequences is more expansive and specific. Specifically, Alternative B requires the trial court to advise that a plea by a noncitizen may result not only in deportation, but also exclusion from [re-]admission; or denial of naturalization. These are potential immigration consequences which an unwitting defendant might not contemplate if he/she is only mindful of the deportation consequence.

The Michigan/Detroit NLG also favors Alternative B because it provides for an opportunity for reflection after the advice is rendered, before the plea is actually entered.

However, the problem the Michigan/Detroit NLG sees with alternative B is that it proposes amending the plea-taking procedure after the factual basis for the plea has been established by the trial court, but before the plea has been accepted. The Michigan/Detroit NLG believes that the purpose of the rule and the interests of justice would be better served if the amendment were placed in the section of the rule which governs the intelligence of the plea, before the factual basis is established.

To that end, The Michigan/Detroit NLG suggests amending Paragraph (B) rather than Paragraph (E) of MCR 6.302, by adding the following provision as a new subparagraph (5) of Paragraph (B), as follows:

MCR 6.302

- (B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

.....

- (5) that a plea of guilty or nolo contendere by a non citizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.

The Michigan/Detroit NLG urges this approach because once the defendant has made admissions in order to establish the factual basis for the plea, it is already too late for the defendant to avoid potential adverse consequences. This is because the federal government can easily base deportation not only on the actual conviction of the state court offense, but simply on factual admissions establishing commission of the offense, with no adjudication of guilt.

MCR 6.610

The Michigan/Detroit NLG suggests the same approach be taken with respect to MCR 6.610 which governs the plea procedure in the District Courts, to be sure that the advice regarding potential immigration consequences is rendered before the defendant makes any factual admissions in order to establish the factual basis for the plea.

In addition, the Michigan/Detroit NLG notes that MCR 6.610(E)(7) permits entry of the plea in the District Court based on a written record and without the defendant's personal appearance, under specified circumstances. In order to ensure that the advice concerning immigration consequences is rendered under these circumstances, the Michigan/Detroit NLG urges amending subparagraph (7) of the rule with new subparagraph (c), as follows:

- (7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance by the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if

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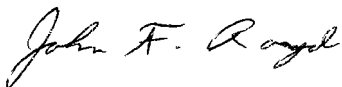
(c) the defendant acknowledges in writing that he/she is aware that a noncitizen who offers a plea of guilty or nolo contendere risks deportation, exclusion from readmission to the United States or denial of naturalization under the laws of the United States; and

(d) the court is satisfied that the waiver is voluntary.

This additional change will ensure that those whose pleas are entered in absentia are also aware of potential immigration consequences if they are noncitizens.

Thank you for your consideration of these comments

Very truly yours,



John F. Royal, President

Julie Hurwitz, Vice-President

Cynthia Heenan, Treasurer

Elisa Gomez, Secretary,

Desiree Ferguson, Chairperson, Michigan/
Detroit NLG Committee on the Michigan Court
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